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No. 92-1546

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN O. IRVINE AND FIRST TRUST NATIONAL ASSOCIATION

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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REPLY BRIEF FOR THE UNITED STATES

I. THE FEDERAL GIFT TAX APPLIES TO THE 1979 DISCLAIMER OF A REMAINDER INTEREST IN A 1917 TRUST

1. Congress designed "the gift tax statute to reach all gratuitous transfers of any valuable interest in property." *Dickman* v. *Commissioner*, 465 U.S. 330, 334 (1984). The statute is broadly written to reach gratuitous transfers of all forms of property and property interests, "however conceptual or contingent" those interests may be. *Smith* v. *Shaughnessy*, 318 U.S. 176, 180 (1943). In *Jewett* v. *Commissioner*, 455 U.S. 305 (1982), this Court held that, in view of the "expansive" scope of the statute, the gift tax "unquestionably encompasses an indirect transfer, effected by means of a disclaimer, of a contingent future interest in a trust" (*id.* at 310). The Court's holding in *Jewett* applies directly to the

1979 disclaimer by Mrs. Irvine of part of her remainder interest in the Ordway Trust.

The basic premise that underlies respondents' brief (Resp. Br. 11-14), however, is that *Jewett* did *not* hold that a disclaimer is a "transfer of property by gift" within the scope of the gift tax statute (26 U.S.C. 2501(a)) and that the tax is imposed, if at all, under the terms of the 1986 Treasury regulation, which respondents claim is inapplicable to trusts created prior to enactment of the gift tax. Respondents' underlying premise rests upon a demonstrably faulty foundation.

In *Jewett*, the Court expressly relied on "the statutory language" for its conclusion that the gift tax "encompasses an indirect transfer, effected by means of a disclaimer, of a contingent future interest in a trust." 455 U.S. at 310. The court emphasized that "the statutory provisions" were the basis for "imposing a gift tax" in that case (*id.* at 317) and that "the treatment of the disclaimers as taxable gifts is fully consistent with * * * *the statutory scheme.*" *Id.* at 310 (emphasis added). The Court specifically held in *Jewett* that the statute—operating independently of the regulation—reached disclaimers and that the taxpayer in that case erred in assuming that he "had a 'right' to renounce the interest without tax consequences that was 'taxen away' by the 1958 regulation." *Id.* at 317. As the Court stated in *Jewett*, under the expansive language of the gift tax statute, the taxpayer "never had such a right." *Ibid.*[1]

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[1] Contrary to respondents' contention, the courts of appeals have not confined this Court's holding in *Jewett* "to its facts" (Resp. Br. 35). In *Kennedy* v. *Commissioner*, 804 F.2d 1332 (7th Cir. 1986), *McDonald* v. *Commissioner*, 853 F.2d 1494 (8th Cir. 1988), cert. denied, 490 U.S. 1005 (1989), and *Estate of Dancy* v. *Commissioner*, 872 F.2d 84 (4th Cir. 1989), the courts considered whether the timeliness of a disclaimer of a survivorship interest in joint tenancy property should be measured from the creation of the joint tenancy or from the death of the cotenant. In each case, the court concluded that, since state law allowed either joint tenant to eliminate the other's right of survivorship "by partition or attachment

The general provisions of the Treasury regulations implement the broad language of the statute by providing that "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax." 26 C.F.R. 25.2511-1(c)(1). As we explain in our opening brief (Br. 21-32), and as we discuss further below (pages 14-20, *infra*), in the promulgation of Treasury regulations in 1958 and in their re-promulgation in 1986, the Commissioner of Internal Revenue has recognized an exception from the expansive coverage of the gift tax for a limited category of disclaimers made within a "reasonable time" after the disclaimant first became aware of the interest. Because Mrs. Irvine's 1979 disclaimer was made 48 years after she reached the age of majority and learned of her interest in the trust, however, it plainly was not made within a "reasonable time." See *Jewett* v. *Commissioner*, 455 U.S. at 318-319. Her disclaimer thus does not come within the regulatory safe harbor and remains subject to tax.[2]

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for debts," "it is impossible to ascertain whether a cotenant has any right of survivorship until the other cotenant dies." *Estate of Dancy* v. *Commissioner*, 872 F.2d at 88. Since the survivorship interest "is created only when a cotenant dies without having partitioned the tenancy," the "reasonable time" within which the interest may be disclaimed without gift tax runs from the death of the cotenant and not from the initial creation of the joint tenancy. *Ibid.* Accord *McDonald* v. *Commissioner*, 853 F.2d at 1499-1501; *Kennedy* v. *Commissioner*, 804 F.2d at 1335-1336. None of those decisions (i) is in any manner inconsistent with *Jewett*, (ii) limits *Jewett* "to its facts" (Resp. Br. 35) or (iii) has any relevance to this case, where it is undisputed that the 1917 transfer in trust was irrevocable several decades before Mrs. Irvine's disclaimer was made (Pet. Br. 26-27 n.14).

[2] Other beneficiaries of the Ordway Trust have acknowledged that *Jewett* resolves the question whether a disclaimer of a remainder interest in a trust is subject to the federal gift tax (*Amici* Ordway Br. 6). They thus do not join in respondents' erroneous underlying premise. They contend

2. Belatedly acknowledging the applicability of *Jewett* to this case, respondents ultimately contend (Resp. Br. 40) that *Jewett* was wrongly decided. They claim that *Jewett* rests upon a mistaken deference to the Commissioner's interpretation of the Code and the regulations to require that a disclaimer be made within a "reasonable time" to escape tax. Respondents assert that, contrary to statements made by government counsel at oral argument in *Jewett*, the Commissioner had, in the past, allowed taxpayers who knew of their interest in property for *more* than a "reasonable time" to disclaim that interest free of tax (*id.* at 40-42).[3]

Respondents' assertion lacks any foundation. The very rulings and General Counsel Memoranda on which respondents rely (Resp. Br. 40-42) emphasize that, to escape taxation, the disclaimer must be made "within a reasonable time from the time that [the taxpayer] first received notice" of her interest in the property disclaimed. J.A. 55 (Priv. Ltr. Rul. 6612201590A (Dec. 20, 1966)). See also J.A. 43 (Gen. Couns. Mem. 27,626 (Jan. 15, 1953) (distinguishing a prompt disclaimer from one "wherein the legatee renounced four years after the decedent's death")).[4]

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instead that the federal gift tax may not be applied to the post-gift tax transfer of an interest in a pre-gift tax trust (*id.* at 6-7). That contention is addressed at pages 7-11, *infra*.

[3] *Amici* Halbach, et al., raised this same contention when they were parties in *Poinier* v. *Commissioner*, 86 T.C. 478 (1986), aff'd in part and rev'd in part, 858 F.2d 917 (3d Cir. 1988). The Tax Court rejected their argument, noting that *amici* were "grasping at straws." 86 T.C. at 485.

[4] The rulings on which respondents and *amici* rely are not inconsistent with the conclusion that the taxpayer must manifest his refusal to accept ownership of property within a reasonable time of learning of his interest to escape the gift tax. It is obvious that if a legatee renounces his interest in a decedent's estate the day after the decedent's will was found and read to him, as occurred in General Counsel Memorandum 27,626 (Jan. 15,

The contention that *Jewett* was based on a misunderstanding of the Commissioner's practice under the gift tax statute has twice been presented to, and rejected by, the lower courts. In *Poinier* v. *Commissioner*, 86 T.C. 478 (1986), aff'd in part and rev'd in part, 858 F.2d 917 (3d Cir. 1988), after noting that the taxpayers "are grasping at straws" (86 T.C. at 485), the Tax Court concluded that the administrative materials on which respondents now seek to rely would not have "persuaded [this Court] to reach a different conclusion in *Jewett*."

1953), the disclaimer is made within a reasonable time. See J.A. 43. General Counsel Memorandum 24,626 (1945), concerned a widow who renounced a life estate created under her late husband's will during the administration of the estate and prior to her receipt of any income from the trust. The memorandum contains no indication that the renunciation was not made within a reasonable time. See Resp. Br. RA1. And Private Letter Ruling 6612201590A, issued on December 20, 1966, involved the renunciation of an income interest in a trust that shifted to the taxpayer as a result of the death of two life beneficiaries, each of whom left an adopted son who stood to succeed to his interest. The Supreme Court of Pennsylvania held that the adopted sons were ineligible to inherit the interest. Promptly upon learning of that decision, the taxpayer, whose interest arose upon default of the life beneficiaries' issue, executed a renunciation, which was treated as nontaxable. The ruling concluded that the renunciation was made within a reasonable time. See J.A. 55. As the Tax Court stated in *Poinier* v. *Commissioner*, 86 T.C. at 485, "[w]e are satisfied that even if the Supreme Court had been aware of this private ruling to another taxpayer, it would not have been persuaded to reach a different conclusion in *Jewett*."

The Commissioner's earlier rulings thus do not support respondents' claim. Even if they had, the Commissioner is free to correct a mistaken interpretation of the law, even when doing so upsets a taxpayer's expectations. *E.g.*, *Dickman* v. *Commissioner*, 465 U.S. 330, 343 (1984); *Dixon* v. *United States*, 381 U.S. 68, 72-75 (1965); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 184-185 (1957). It can hardly be contended, in any event, that any of the rulings that respondents cite had any bearing on Mrs. Irvine's decision in 1931 not to disclaim her interest in the Ordway Trust.

Ibid.[5] Similarly, in *Estate of Bunn* v. *United States*, 3 Cl. Ct. 547, 549-550 (1983), the Claims Court rejected the taxpayer's assertion that *Jewett* was "the product of a misrepresentation foisted upon the Supreme Court by government counsel in oral argument." *Id.* at 549-550. As the court noted, the rulings on which respondents seek to rely do "not reflect the inconsistency in the Commissioner's position which plaintiffs claim." *Id.* at 550.[6] To the contrary, the litigated cases reflect that the Commissioner has consistently taken the position that a disclaimer not made within a reasonable time after the taxpayer first acquires knowledge of the interest remains subject to the federal gift tax. See, *e.g.*, *ibid.*; *Fuller* v. *Commissioner*, 37 T.C. 147 (1961); *Keinath* v. *Commissioner*, 58 T.C. 352, 358-359 (1972), rev'd, 480 F.2d 57 (8th Cir. 1973); *Estate of Halbach* v. *Commissioner*, 71 T.C. 141, 146 (1978); *Cottrell* v. *Commissioner*, 72 T.C. 489 (1979), rev'd, 628 F.2d 1127 (8th Cir. 1980); *Estate of Hoenig* v. *Commissioner*, 66 T.C. 471, 477 (1976)).[7]

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[5] The ruling on which the Tax Court focused in *Poinier* was the same 1966 letter ruling that respondents invoke in their brief in this Court. See 86 T.C. at 485; Resp. Br. 42. That letter ruling addressed the question of when, on the particular facts of that case, the taxpayer first learned of the interest disclaimed. See J.A. 53-55. It did not in the slightest manner indicate any departure from the Commissioner's established requirement that, to escape the gift tax, the disclaimer must be made "within a reasonable time from the time that [the taxpayer] first received notice" of the interest to be disclaimed. J.A. 55. See note 4, *supra*.

[6] The Claims Court further noted "that Jewett's counsel likewise conceded that the Commissioner's interpretation of the regulation had been consistent." *Estate of Bunn* v. *United States*, 3 Cl. Ct. at 550.

[7] Considerations of *stare decisis* have special force in cases involving statutory interpretation. If Congress perceived any error in the reasoning of *Jewett*, it was free to correct it. See *California* v. *FERC*, 495 U.S. 490, 500 (1990). On two occasions after *Jewett* was decided, however, Congress rejected proposals to enact legislation to exempt disclaimers such as Mrs. Irvine's from the gift tax. In 1986, Congress rejected a Senate bill

3. The Court held in *Jewett* that the gift tax applies to the transfer by disclaimer of a remainder interest in a trust. 455 U.S. at 310. That conclusion is not made inapplicable to this case by the fact that the trust involved here was created before the gift tax was enacted in 1932. The transaction to which the gift tax applies is Mrs. Irvine's 1979 disclaimer, not Lucius Ordway's 1917 transfer in trust. Application of the gift tax to Mrs. Irvine's 1979 disclaimer does not result in a retroactive imposition of the gift tax, as respondents (Resp. Br. 20) and *amici* (*Amici* Ordway Br. 7) contend.

Mrs. Irvine's decision to disclaim her interest in the trust was made in 1979. There is nothing "retroactive" about imposing a tax on transfers of property that was enacted in 1932 to a transfer of property that occurred in 1979. As this Court held in rejecting a similar claim in *United States* v. *Jacobs*, 306 U.S. 363 (1939), "the tax does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax." *Id.* at 366-367. See also *Fernandez* v. *Wiener*, 326 U.S. 340, 355 (1945) ("a tax upon the termination by death of a power to dispose of property, created before the enactment of the tax statute, does not offend due process"); *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339, 345 (1929) (a tax is not retroactive when it applies to a transfer

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that would have exempted from gift tax a disclaimer of an interest in property created before November 15, 1958, if the disclaimer was made before December 9, 1980 (the date of the Ninth Circuit's decision in *Jewett* in favor of the Commissioner) and was made within a reasonable time after the interest vested in the taxpayer. See H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. Pt. 2, at 771 (1986). In 1984, Congress rejected a similar proprosal that would have permitted a disclaimer of a property interest created by a transfer occurring before November 15, 1958, to be made on a tax-free basis within 90 days after the date of enactment. See H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1238 (1984).

that "followed the passage of the statute"); Pet. Br. 18-19.[8] See also cases cited note 14, *infra*. The fact that Mrs. Irvine's

[8] Respondents do not squarely address or deny the obvious relevance of *United States* v. *Jacobs*, and related cases, to their claim that the statute cannot constitutionally be applied "retroactively" to a post-gift tax transfer of an interest created in a pre-gift tax trust. Instead, respondents contend only that *Jacobs* has "no bearing" on their different argument that Congress did not intend for the gift tax to be applied in this manner (Resp. Br. 30 n.24). What respondents overlook is that *Jacobs* held that Congress *did* intend to apply the estate tax, which is the precursor of the gift tax, to the "change in ownership" that occurs from events occurring after that tax was enacted. *United States* v. *Jacobs*, 306 U.S. at 367. Respondents' suggestions that the gift tax should not be applied to a post-gift tax "change in ownership" of property simply because that property was received by gift before the gift tax was enacted has no support in the statute, its history or the case law. There is nothing to suggest that Congress meant to limit the statutory phrase "transfer of property" (26 U.S.C. 2501(a)) to mean "transfer of property not received prior to this enactment by gift." The plain language of the statute, this Court's decisions in *Jacobs*, *Reinecke* and *Fernandez*, as well as common sense, all counsel against respondents' strained assertion.

The Ordway *amici* contend that *Jacobs* is distinguishable from this case because in *Jacobs* the decedent had "an opportunity *after* passage of the taxing legislation to reorder his or her affairs to avoid the tax" (*Amici* Ordway Br. 17). That purported distinction fails. Lucius Ordway, who funded the trust in 1917, is not subject to any tax. His interest in, and control over, the gift expired before the gift tax was enacted. The fact that he could no longer "reorder" his affairs merely reflects that his transfer in trust of a gift to Mrs. Irvine had become final. See *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 43-45 (1939). Moreover, Mrs. Irvine, who became aware of her interest in the trust no later than 1931, could have disclaimed her interest in the trust *before* the gift tax was enacted or, in ordering her *own* affairs, could have elected *not* to disclaim the interest thereafter. Mrs. Irvine elected instead to retain her income and remainder interest in the trust for many years and then disclaim it 47 years after the gift tax was enacted. It cannot be said that imposing a tax enacted in 1932 to a disclaimer made in 1979 is retroactive "merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax." *United States* v. *Jacobs*, 306 U.S. at 367.

interest in the trust was created before 1932 does not alter the critical fact that she relinquished her interest in the trust more than four decades *after* the tax on "transfer[s] of property by gift" (26 U.S.C. 2501(a)) had been enacted. The relinquishment of a valuable property right in 1979—47 years after the gift tax took effect—is an event that gives rise to gift tax liability. See, *e.g.*, *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 43 (1939); *Burnet* v. *Guggenheim*, 288 U.S. 280, 285 (1933) (the gift tax is upon the "present transfer" of the valuable property right).[9]

Respondents point out that, when Congress enacted the new disclaimer rule in Section 2518 in 1976—requiring disclaimers to be made within nine months of the creation of the interest to escape gift tax (26 U.S.C. 2518(b)(2))—Congress provided that "the new rule would apply only to disclaimers of interests created after 1976" (Resp. Br. 28). Respondents (*id.* at 28-29) and their *amici* (*Amici* Ordway Br. 3) contend that this 1976 legislation reflects a congressional intent—which they impute back to 1932—that rules concerning the taxation of disclaimers should be applied only prospectively.

The intention of Congress in enacting amendments to the gift tax in 1976 is, of course, a feeble guide in the interpretation of the legislation it enacted in 1932. Respondents' contention, in any event, ignores the fact that, in enacting the 1976 amendments, Congress did not disturb the preexisting scheme under which disclaimers of interests created before that date

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[9] The Ordway *amici* assert (*Amici* Br. 6), without supporting authority, that application of the gift tax to Mrs. Irvine's 1979 disclaimer would violate the gift tax provision which states that "[t]he tax shall not apply to a transfer made on or before the date of enactment of this Act [June 6, 1932]." Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 245. Since Mrs. Irvine's transfer was made in 1979, and therefore obviously was not "made on or before" June 6, 1932, that provision has no application to this case.

remained subject to tax if the disclaimer was not made within a "reasonable time." See Tax Reform Act of 1976, Pub. L. No. 94-455, §§ 2009(b)(1), 2045(e)(2), 90 Stat. 1893, 1894. The 1976 amendments simply replaced, for interests created thereafter, the regulatory requirement that the disclaimer occur within a "reasonable time" with the more specific criterion that the disclaimer must be made within "9 months" after the interest was created. 26 U.S.C. 2518(b)(2).[10] The history and structure of the 1976 amendments thus provide no support for respondents' contention that Congress intended the post-1932 disclaimer of interests created prior to enactment of the gift tax to escape tax.[11]

The plain language of the federal gift tax statute affords no exemption for the disclaimer of property that was in existence before 1932. Many property rights currently in existence were created before 1932. For example, in 1917, Mrs. Irvine's grandfather could have given her an interest in a house that was built in that year. If Mrs. Irvine gratuitously transferred her interest in that house after the gift tax was enacted, that transfer would unquestionably be subject to tax. In *Jewett*, 455 U.S. at 310, this Court concluded that the transfer of an interest in trust by disclaimer is, like the transfer of other forms of "property," subject to the federal gift tax. Respondents' suggestion that a remainder interest in a trust created before 1932 should be treated differently from other forms of property created before 1932 is contradicted by the plain, unqualified language of the statute. As this Court observed in *Jewett* v. *Commissioner*, in enacting the gift tax in 1932, Congress used the term "property" "in the broadest and most compre-

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[10] The interest may be disclaimed later if the disclaimant has not attained "age 21" at that time. 26 U.S.C. 2518(b)(2)(B).

[11] Moreover, Congress has now twice declined to enact legislation that would have exempted disclaimers such as Mrs. Irvine's from tax. See note 7, *supra*.

hensive sense" (455 U.S. at 309, quoting S. Rep. No. 665, 72d Cong., 1st Sess. 39 (1932), and H.R. Rep. No. 708, 72d Cong., 1st Sess. 27 (1932)).

4. Congress has found it necessary to provide special treatment for one particular type of property under the gift tax. Under Section 2514 of the Internal Revenue Code, while the release of a general power of appointment is generally subject to the gift tax (26 U.S.C. 2514(b)), the release of such a power created on or before October 21, 1942, is not subject to tax. 26 U.S.C. 2514(a). Respondents erroneously contend (Resp. Br. 28 n.22) that the gift tax treatment to be afforded to Mrs. Irvine's disclaimer should be the same as that afforded to the release of a general power of appointment created on or before October 21, 1942.

The special provisions that have been enacted for powers of appointment represent the culmination of a lengthy historical development of the estate and gift tax treatment of such powers. Prior to 1942, property over which a decedent held an unexercised general power of appointment "was held not taxable under any provisions of the estate tax law because the power did not give the decedent an interest in the property."[12] Craven, *Powers of Appointment Act of 1951*, 65 Harv. L. Rev. 55, 56 (1951), citing *Helvering* v. *Safe Deposit & Trust Co.*, 316 U.S. 56 (1942).[13] The result of that rule left the gift tax

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[12] By contrast, a contingent remainder interest is unquestionably an interest in "property" within the meaning of the gift tax (26 U.S.C. 2501(a)). *Jewett* v. *Commissioner*, 455 U.S. at 310.

[13] Prior to 1921, the Treasury took the position in Regulations 37, Art. XI 1917), that property passing under a general power of appointment was includable in the appointor's gross estate under Section 202(a) of the Revenue Act of 1916, ch. 463, 39 Stat. 777. The Court rejected the Treasury's position in *United States* v. *Field*, 255 U.S. 257 (1921), however, and held that property passing under the exercise of a general power of appointment was not subject to the estate tax under Section 202(a) because the property passing under the power was not subject to

treatment of the release of a general power of appointment uncertain (Craven, *supra*, 65 Harv. L. Rev. at 56) (citations omitted):

> The gift tax statute in force prior to the Revenue Act of 1942 contained no provision dealing specifically with property over which a power of appointment was exercised or released. The statute merely taxed the transfer of property by an individual by gift, and there was uncertainty about the effect of the exercise or release of a power of appointment. * * * There was a conflict of decisions on the effect of exercising in favor of another or giving up a power to take income or principal of a trust created by another.

In 1942, Congress concluded that the then-existing treatment of powers of appointment "has been found to be extremely inadequate in scope and an outstanding device for the avoidance of the estate tax." H.R. Rep. No. 2333, 77th Cong., 2d Sess. 160 (1942); S. Rep. No. 1631, 77th Cong., 2d Sess. 232 (1942). Congress therefore enacted legislation to require inclusion of property subject to an unexercised general power of appointment in a decedent's estate for estate tax purposes and also amended the gift tax provisions to assure conformity. Revenue Act of 1942, ch. 619, §§ 403, 452, 56 Stat. 942, 952; see Craven, *supra*, 65 Harv. L. Rev. at 58-59. The 1942 law applied the gift tax to releases of general powers of appointment without regard to whether the powers were created before of after the date of the statute. Craven, *supra*, 65 Harv. L. Rev. at 60, 61. But, in the 1942 Act, Congress provided a brief period of grace until January 1943 for the tax-free release of powers of appointment. That brief grace period was thereafter "extended by Congress ten successive times, the last

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distribution as part of the donee's estate, as the statute then expressly required. 255 U.S. at 264.

extension being made until July 1, 1951." *Id.* at 60. The series of compromises that resulted in these extensions ultimately culminated in the Revenue Act of 1951, which drew the distinction still present in the gift tax between the non-taxable release of a general power of appointment created before 1942 (26 U.S.C. 2514(a)) and the taxable release of a power created after 1942 (26 U.S.C. 2514(b)).

To be sure, as respondents point out (Resp. Br. 27), the release of a general power of appointment, like the disclaimer of a trust interest, may constitute an indirect transfer that serves as an estate planning technique. Congress recognized this fact by specifically making the release of a general power of appointment created after October 21, 1942, subject to the gift tax. 26 U.S.C. 2514(b). Although it ultimately chose not to do so, it is beyond question that Congress also could have imposed—and in 1942 did impose (subject initially to a brief grace period)—the gift tax on the release of a general power of appointment created *before* October 21, 1942.[14] The limited

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[14] In *United States* v. *Field*, 255 U.S. 257 (1921), the Court noted that no one had questioned "the power of Congress to impose a tax upon the passing of property under testamentary execution of a power of appointment created before but executed after the passage of the taxing act." *Id.* at 261-262, citing *Chanler* v. *Kelsey*, 205 U.S. 466, 473, 478-479 (1907), and *Knowlton* v. *Moore*, 178 U.S. 41, 56-61 (1900). Indeed, in the Revenue Act of 1918, ch. 18, §§ 401, 402(c), 40 Stat. 1096-1097, Congress had subjected to the estate tax property passing under a general power of appointment created before the date of enactment of the tax, and the courts subsequently upheld that provision against due process challenges. *Stratton* v. *United States*, 50 F.2d 48, 49 (1st Cir.), cert. denied, 284 U.S. 651 (1931); *Lee* v. *Commissioner*, 57 F.2d 399, 401 (D.C. Cir.), cert. denied, 286 U.S. 563 (1932). In *Saltonstall* v. *Saltonstall*, 276 U.S. 260, 271 (1928), moreover, the Court rejected a due process challenge to a Massachusetts inheritance tax provision imposing a tax upon the succession to property subject to an unexercised general power of appointment created before the statute's passage, stating that "[s]o long as the privilege of succession has not been fully exercised it may be reached

and express exemption eventually afforded for pre-1942 general powers of appointment in Section 2514 plainly represents a matter of political compromise and legislative grace.

Congress has enacted no such exemption for disclaimers. There is no basis for respondents' contention that Congress, though silent on the subject, intended by implication in 1932 to provide the same treatment for disclaimers that was expressly provided in 1951 for powers of appointment. See also note 12, *supra*. When Congress enacted Section 2518 in 1976, it was for the purpose of making express and more specific the rules for taxation of disclaimers that had been developed administratively and in the case law under the 1932 Act. Moreover, Congress has at least twice rejected proposals to provide a "grace period" for the tax-free disclaimer of interests created in earlier years. See note 7, *supra*. Respondents' invocation of the different treatment ultimately afforded to general powers of appointment under estate and gift tax legislation has no bearing on the taxation of disclaimers for, "absent an express exclusion from its provisions, any transfer meeting the statutory requirements must be held subject to the gift tax." *Dickman* v. *Commissioner*, 465 U.S. at 335 n.4.

II. THE FEDERAL GIFT TAX REGULATIONS DO NOT EXEMPT THE DISCLAIMER INVOLVED IN THIS CASE FROM TAX

The gift tax regulations, as promulgated in 1958 and as repromulgated in 1986, set forth the general rule that the gift tax reaches "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of

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by the tax." As the Court later noted in *Chase National Bank* v. *United States*, 278 U.S. 327, 336 (1929), although *Saltonstall* involved a succession tax, rather than an estate tax, its holding applies equally to the federal estate tax. See also Griswold, *Powers of Appointment and the Federal Estate Tax*, 52 Harv. L. Rev. 929, 954 (1939).

the means or device employed." 26 C.F.R. 25.2511-1(c)(1). Under the broad language of the regulations, as well as under the comprehensive provisions of the statute itself, the disclaimer of a contingent future interest in a trust represents an "indirect transfer" of property to which the gift tax applies. See *Jewett* v. *Commissioner*, 455 U.S. at 310. The 1986 version of the regulations, like the 1958 version that was before the Court in *Jewett*, however, provides a limited exception, or safe harbor, under which a disclaimer "does *not* constitute a gift if two conditions are met" (455 U.S. at 310 (emphasis added); see 26 C.F.R. 25.2511-1(c)(2)): (i) "the disclaimer must be effective as a matter of local law" (455 U.S. at 316); and (ii) "the disclaimer must be made within a reasonable time" (*ibid.*). Since Mrs. Irvine's disclaimer was not made within a reasonable time, her disclaimer remains subject to tax. See *id.* at 318-319.

Respondents do not seriously contend that Mrs. Irvine—who waited 48 years after she became aware of her interest to disclaim it—can qualify her disclaimer under the "reasonable time" requirement of the regulation.[15] Respondents instead contend (Resp. Br. 14-20) that, due to the particular wording of the 1986 version of the regulations,[16] that regulatory excep-

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[15] Respondents suggest (Resp. Br. 33-39) that her disclaimer could be regarded as within a "reasonable time" of the death of the last of her senior relatives, when the remainder became a present, rather than a future, interest. It is perfectly clear, however, that *Jewett*—which addressed the question whether the "reasonable time" provided by the regulation runs from "the creation of petitioner's remainder interest" or from "the vesting of that interest" (455 U.S. at 311)—directly rejects respondents' contention. See *id.* at 318.

[16] The 1986 version of the regulation was not in force when Mrs. Irvine made her disclaimer in 1979. Instead, the 1958 version involved in *Jewett* was in effect at that time. We do not dispute, however, that the 1986 version of the regulations should be applied in this case. See Pet. Br. 21 n.8. Respondents err in asserting (Resp. Br. 20) that it is imper-

tion can not possibly apply to the disclaimer of any property acquired through a pre-1932 gift. For the reasons to be discussed, that contention is in error. But when an *exception* from a tax is unavailable, the obvious result is then that the tax is due. Respondents' contention is therefore unavailing in any event.

1. Both the 1958 and the 1986 versions of the regulation provide an exception from the gift tax for a disclaimer made "within a reasonable time after knowledge of the existence of the transfer." 26 C.F.R. 25.2511-1(c)(2); *Jewett* v. *Commissioner*, 455 U.S. at 311. The introductory language of this paragraph of the 1986 regulation, however, adds a phrase that was not present in the 1958 regulation. It limits the coverage of the regulation to "taxable transfers creating an interest in the person disclaiming made before January 1, 1977" (26 C.F.R. 25.2511-1(c)(2)).[17]

Respondents assert that the 1986 regulation does not apply to Mrs. Irvine's disclaimer because the interest she disclaimed was created in a pre-1932 gift that was not a "taxable transfer."[18] The term "taxable transfer" in the amended regulation,

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missible "retroactively" to apply the 1986 regulations to this transaction. (Of course, if the 1958 regulation were applied instead, respondents' contentions concerning the effect of the safe-harbor regulation would be precluded by this Court's decision in *Jewett*.) An amended regulation that interprets a statute "is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand." *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 135 (1936).

[17] This language was adopted to conform the 1986 regulations governing the disclaimer of pre-1977 interests with the language of the regulations adopted at the same time under 26 U.S.C. 2518, governing the disclaimer of post-1976 interests. See Pet. Br. 24 n.12.

[18] Respondents' argument is not limited to pre-1932 gifts of remainder interests in trusts. It could apply equally to the disclaimer of any property acquired through a pre-1932 gift because, in respondents' view, such

however, is defined by the regulation to refer merely to a transfer that is a completed gift "regardless of whether a gift tax is imposed on the completed gift." 26 C.F.R. 25.2518-2(c)(3).[19] As the court held in *Ordway* v. *United States*, 908 F.2d 890 (11th Cir. 1990), cert. denied, 111 S. Ct. 2916 (1991), under these regulations, a "taxable transfer" occurs "whenever there happens 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' even if that transaction was not subject to the gift tax." 908 F.2d at 895, quoting 26 C.F.R. 25.2511-1(c)(1).[20] See also Pet. Br. 26-27; Pet. App. 18a (McMillian, J., dissenting). Because the transfer in trust to Mrs. Irvine in 1917 represented a

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property was not acquired in a "taxable transfer." If, for example, a taxpayer was given a remainder interest in real estate in 1931, and the life tenant did not die until 1991, under respondents' view, if the remainderman were permitted by state law to disclaim his interest in 1991, it would pass to his successors without tax.

[19] The suggestion of the Ordway *amici* that the phrase "taxable transfer" is a "term of art" (*Amici* Ordway Br. 21) that is defined in 26 U.S.C. 2501 is not correct. That phrase is defined in the 1986 regulations, not in the statute. Although the statute to which *amici* refer contains the heading "taxable transfers," the text of that provision contains no mention, must less any definition, of that term. The term "taxable transfer," as used and defined in the manner described in the 1986 regulations to refer to a "completed gift" (26 C.F.R. 25.2518-2(c)(3)), was given the same meaning in legislative materials issued upon enactment of Section 2518 in 1976. See Pet. Br. 24 n.12.

[20] Respondents attempt to make much of a citation error that occurred in the quotation of language from the *Ordway* decision that appeared at page 26 of our opening brief. At that point of our brief, having quoted and properly cited the same language from the *Ordway* decision that appears in text here, the brief then repeated part of the language of that quotation and cited the regulation and not the court's opinion as the source. While we regret this inadvertent error, respondents overreact by contending that we have "misleadingly" (Resp. Br. 15) described these authorities to the Court. In any event, we take this opportunity to correct the error.

completed gift, and therefore a "taxable transfer" within the meaning of the 1986 regulations, her 1979 disclaimer was not made within a "reasonable time" of that transfer and does not qualify under the regulatory safe harbor.

2. Even if, as respondents contend, Mrs. Irvine's disclaimer were not within the ambit of the regulatory exception from the gift tax, that would not assist her. 26 C.F.R. 25.2511-1(c)(2) creates an *exception* to the otherwise comprehensive scope of the gift tax. If Lucius Ordway's 1917 transfer in trust was not a "taxable transfer" under that safe-harbor regulation, then her disclaimer is subject to the general rule of the statute and the regulation that "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax." 26 C.F.R. 25.2511-1(c)(1). Under this general rule, Mrs. Irvine's long-delayed disclaimer is subject to tax as an "indirect transfer" that reduced "the expected size of [her] taxable estate and [conferred] a gratuitous benefit upon the nature objects of [her] bounty" (*Jewett* v. *Commissioner*, 455 U.S. at 310).[21] Absent the regulatory exception, the disclaimer is taxable under the general rule. See *Dickman* v. *Commissioner*, 465 U.S. at 335 n.4.

Respondents err in contending (Resp. Br. 19) that if the 1986 regulation's exemption for disclaimers made within a "reasonable time" does not apply to this case, the taxability of Mrs. Irvine's disclaimer must then be determined simply by whether her disclaimer was valid under state law. The premise of respondents' argument is that the decision in *Jewett* was based solely upon an interpretation of the 1958 regulation. For the reasons discussed above (pages 1-3, *supra*), that con-

[21] Because Mrs. Irvine enjoyed the income from the trust for at least 13 years before she sought to disclaim her interest, the conclusion that her disclaimer is subject to the gift tax would be reached under the reasoning of the dissent, as well as the majority, in *Jewett*. See Pet. Br. 15-16 n.4.

tention is not correct. See *Jewett* v. *Commissioner*, 455 U.S. at 310. As the Court explained in *Jewett*, the passage of time is crucial to the scheme of the gift tax, and a disclaimer that satisfies state law concerns does not satisfy the federal concern that the delayed relinquishment of an interest in valuable property can serve as a testamentary substitute and effect a gratuitous transfer that is an appropriate subject of taxation. *Id.* at 310, 318. See also Pet. Br. 31-32. In urging that state law should control, respondents simply fail to acknowledge that the Court in *Jewett* expressly held that a disclaimer constitutes an "indirect transfer" of property that is subject to tax under the comprehensive provisions of the gift tax statute (455 U.S. at 310).

There is also no merit to respondents' contention that *Jewett* should not be applied "retroactively" to Mrs. Irvine's disclaimer. Respondents assert (Resp. Br. 37-29) that since her disclaimer was made in 1979—before this Court decided *Jewett* in 1982—she was entitled to rely upon the Eighth Circuit's decision in *Keinath* v. *Commissioner*, 480 F.2d 57 (1973).[22] In *Jewett*, however, the Court expressly rejected the

[22] Respondents' theory of detrimental reliance is factually insubstantial. If Mrs. Irvine had *not* disclaimed her interest in 1979 (subjecting it to the gift tax), it would have remained part of her estate and been subjected to the estate tax upon her death in 1987. Due to the unified nature of the gift and estate tax, the effect of the disclaimer was to somewhat accelerate, not materially alter, the tax consequences of the dispositions of her wealth. By contrast, if respondents' theory were accepted, Mrs. Irvine would obtain a substantial windfall, for the property would escape tax completely: if the rejected rule of *Keinath* were applied, her disclaimer would escape the gift tax in 1979 and the estate tax would be inapplicable because the property was no longer part of her estate at her death.

Moreover, Mrs. Irvine could hardly have "relied" upon *Keinath* (which was decided in 1973) during the prior 42 years when she was aware of her trust interest and did not disclaim it. By 1979, when Mrs. Irvine belatedly decided to make her disclaimer, the regulations containing the

decision in *Keinath* and held that the disclaimer of a remainder interest in a trust represents a taxable gift. See 455 U.S. at 317 n.19. Reliance upon an erroneous appellate decision does not immunize a taxpayer from the tax laws. *United States* v. *Estate of Donnelly*, 397 U.S. 286, 294-295 (1970) (per curiam).

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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"reasonable time" requirement were 21 years old and the Tax Court had already decided *Jewett* in the Commissioner's favor. Throughout this period, the Commissioner continued to litigate the issue until it was authoritatively resolved by this Court in *Jewett*. All taxpayers, including Mrs. Irvine, were of course on notice that the reasoning of *Keinath* could be rejected by this Court. Respondents therefore err in asserting that application of *Jewett* to her disclaimer is "unfair" and "inequitable" (Resp. Br. 39). See *Estate of Bunn* v. *United States*, 3 Cl. Ct. 547, 550 (1983).

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